

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Mendocino
(County File No. 230903-1)

Administrative Docket No. 118

DECISION

**RIC PIFFERO VINEYARDS
P.O. Box 622
Redwood Valley, California 95470**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Mendocino County Agricultural Commissioner (CAC) found that Ric Piffero Vineyards violated 3 CCR section 6614(b)(3). The commissioner imposed a penalty of \$450 for the violation.

Ric Piffero Vineyards appealed the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction over the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are in the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Facts

On the morning of June 24, 2003, Ric Piffero Vineyards made an application of Wilbur-Ellis Dusting Sulfur, E.P.A. No. 2935-48, to his vineyard adjacent to Bisby Avenue at a rate of 12 pounds per acre. Directly adjacent to the vineyard are two residences, located at 180B and 200 Bisby Avenue, respectively. A fence separates these residences from Ric Piffero's vineyard. Two additional residences, 304 and 306 Bisby Avenue, and the Laughing Duck Vineyard Shop are located behind the residence at 200 Bisby Avenue. Bruce Hatch is the owner of the Bisby Avenue residences and the Laughing Duck Vineyard Shop. This was the only application of dusting sulfur made in the vicinity of the Bisby Avenue residences during June 2003.

The dusting sulfur application began at 4:00 a.m. in the first and second rows of the vineyard directly adjacent to 200 Bisby Avenue, the residence occupied by Nick Clouser, his wife, and daughter. The temperature high for the day was 86 degrees. The Clouser residence is 11 feet from the property line and 30 feet from the first vine row, does not have air-conditioning, and is not airtight. Thus, the windows were open in order to provide ventilation.

Nick Clouser was awakened by the sound of the tractor. In order to mitigate the effects of the application onto his property, he got up out of bed to close the windows and take the clothes off the clothesline. Despite these efforts, a sulfur haze infiltrated the Clouser residence, which smelled of sulfur for most of the day.

The Clouser's daughter became ill with a scratchy throat and vomiting. All of the Bisby Avenue residents, including Nick Clouser and his wife, complained of symptoms consistent with sulfur exposure (e.g., burning eyes, stuffy noses, and irritated throats.) None of the residents sought medical attention as a result of their exposure.

The Mendocino CAC's staff collected swab samples in a gradient pattern beginning with the control swab and working towards the vineyard. The collected samples were sent to the California Department of Food and Agriculture's (CDFA), Center for Analytical Chemistry (laboratory) for analysis. The CDFA laboratory's reports showed that all samples taken from the

Clouser property tested positive for sulfur. The highest sulfur level, 37 u.g.(micrograms), was found at the window on the south side of the Clouser residence facing the vineyard, which is the sampling location closest to the vineyard. The lowest sulfur level, 2.2. u.g., was found on the window of a shed, which is the sampling location farthest from the vineyard. A residue sample swab taken from vines on the south side of the Clouser residence tested positive for sulfur at 66 p.p.m. (parts per million.) The sample sites and their respective concentrations of sulfur were consistent with pesticide drift. The laboratory results are consistent with Ric Piffero's stipulation at the hearing that he did contaminate the Clouser residence with dusting sulfur.

The registered label information in the record for Wilbur Ellis Dusting Sulfur reads: "Caution" "Keep Out of Reach of Children" "Causes moderate eye irritation. Harmful if absorbed through skin. Avoid contact with skin, eyes, or clothing. Wash thoroughly with soap and water after handling."

Appellant's Contentions

Appellant alleges that the occurrence of drift in and of itself does not establish that there was a reasonable possibility of contamination to nontarget private property. When the dusting sulfur application was started, no reasonable possibility of drift existed given calm wind, a buffer zone of at least 34 feet, and a row of grapevines between the applicator and the Clouser residence. Appellant argued that the wind was calm when the application was started but, two hours later, it had picked up and changed direction blowing dusting sulfur towards the Bisby Avenue residences.

Appellant contended that the hearing officer failed to make a finding of fact regarding a reasonable possibility of contamination at the specific time and place of the dusting sulfur application. Additionally, Appellant challenged the credibility of the complaining parties' testimony as to the magnitude of the problem as well as the to Appellant's actual conduct. Appellant alleges that both Bruce Hatch and his tenant Nick Clouser had ulterior motives for exaggerating the health effects resulting from the contamination since they later filed a complaint against the Appellant that includes the issue of pesticide trespass arising from the dusting sulfur application at issue. Appellant also contended that if the Clousers had become as ill as alleged, they would have sought medical attention.

Section 6614(b)(3)

Section 6614(b)(3) prohibits a pesticide application being "made or continued when there is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered."

Under “Directions For Use,” the dusting sulfur label states: “Do not apply this product in such a way that will contact workers or other persons either directly or through drift.” The label also states: “The operator of the property and the applicator must establish a buffer zone of enough distance to prevent drift onto non-target areas such as hospitals, clinics, schools, and residential areas. . .” The Sulfur Best Application Practices Manual also recommends the use of an adequate buffer zone to protect sensitive areas and cites the same definition of an “adequate buffer zone” as the dusting sulfur label in addition to recommending the use of wettable sulfur formulations in fields located near sensitive sites, such as residential areas.

By definition, an adequate buffer zone is measured as enough distance to prevent drift onto nontarget areas. In this case, there was a 30-foot space between the Clouser residence and the first vine row. Laboratory tests demonstrated that sulfur contamination ranging from 2.2 u.g. to 37 u.g. was detected on the Clouser’s property. Also, there was no other source of the sulfur contamination. Since the Clouser residence was contaminated as a direct result of the dusting sulfur application, Appellant failed to establish an adequate buffer zone at the time the application was made. The lack of an adequate buffer zone establishes that there was reasonable possibility of contamination at the time the dusting sulfur application was made. Therefore, whether the wind picked up and changed direction towards the end of the application does not constitute a defense to section 6614(b)(3).

Because of prior complaints of sulfur drift, Ric Piffero Vineyards had agreed during the summer of 2002 to notify the Clousers before applying dusting sulfur. Notification would provide the Clousers a reasonable opportunity to ameliorate the effects of drift and to possibly vacate their home. The existence of the notification agreement demonstrates that Ric Piffero Vineyards had actual knowledge of the potential for drift and must have known that a reasonable possibility existed that the dusting sulfur application could result in contamination to the adjacent property. In this case, the Clousers allege that they did not receive notice of the application. The Appellant maintains that he did attempt to notify the Clousers.

Ric Piffero Vineyards incorrectly asserts that the degree of pesticide exposure and injury is relevant in order to establish that a health hazard occurred as a result of the pesticide contamination. Section 6614(b)(3) merely requires the creation of a health hazard, preventing the normal use of one’s property. In this case, there is substantial evidence in the record that various Bisby Avenue residents experienced symptoms consistent with sulfur exposure (e.g., burning eyes, stuffy noses, and irritated throats). There is substantial evidence that not only did a health hazard occur as a result of the contamination but also that an actual health effect was created.

The Clousers had to shut their windows when the application was started and bring in their laundry before the clothes could get contaminated. Since the house is not airtight, it smelled of sulfur for most of the day. It is reasonable to infer that the Clouser family would have contact with sulfur on their property or in their home. For these reasons, the Clousers were deprived of normal use of their property.

The hearing officer found that Ric Piffero Vineyards violated section 6614(b)(3) based on the testimony and documentary evidence introduced at the hearing. The hearing officer also determined that the testimony of Bruce Hatch and Nick Clouser was credible. The hearing officer determines issues regarding witness credibility; the Department therefore defers to the hearing officer's finding of credibility.

A reasonable inference from information in the record is that Ric Piffero Vineyard's application of dusting sulfur was made when there was a reasonable possibility of contamination of nontarget private property (e.g., the Clouser residence.)

Was the Violation Properly Classified as Serious?

In relevant part, section 6130 of 3 CCR provides that serious violations are repeat moderate violations, or violations which created an actual health or environmental hazard.

In order for a violation to be classified as a serious violation under 3 CCR section 6130, where the county does not produce evidence that the violation at issue is not a repeat moderate violation, the violation must have created an actual health or environmental hazard. According to Merriam Webster's Collegiate Dictionary, Tenth Edition, a hazard is a "source of danger." While an actual health effect may support a finding that the violation created an actual health hazard (source of danger), it is not required that an actual health effect occur in order for a violation to be classified as serious.

There is information in the record regarding illness or poisoning that dusting sulfur can cause to exposed persons. In this case, various Bisby Avenue residents became ill with symptoms consistent with sulfur exposure. A reasonable inference from this information is that the violation not only created an actual source of danger to the resident's health (actual health hazard), but also created an actual health effect. Therefore, this violation is properly classified as serious.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

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Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$450 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

By: original signed by _____ Dated: 4-28-04 _____
Paul E. Helliker
Director